

MAIL STOP APPEAL BRIEF-PATENTS
PATENT
0512-1280

**IN THE U.S. PATENT AND TRADEMARK OFFICE BEFORE
THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re application of

Sylvain DAL et al.

Conf. 6617

Application No. 10/537,663

Group 1794

Filed June 12, 2006

Examiner B. O'Hern

POLYPROPYLENE CONDITIONING PACKAGE

APPEAL BRIEF

MAY IT PLEASE YOUR HONORS:

1. Real Party in Interest

The real party in interest in this appeal is:

FROMAGERIES BEL, 4, Rue d'Anjou-75008 PARIS, FRANCE.

2. Related Appeals and Interferences

None.

3. Status of Claims

Claims 7-19 are pending in the application and stand rejected, from which this appeal is taken.

4. Status of Amendments

A Response containing no claim amendments was filed on June 17, 2009, addressing the final Office Action mailed March 17, 2009, which was entered by the Advisory Action of June 25, 2009. The claims at issue are thus those set forth in the Amendment filed January 14, 2009.

5. Summary of Claimed Subject Matter

Independent claim 7: A leakproof package in the form of a rectangular parallelepiped of polypropylene suitable for rapid opening by tearing and for containing a semisolid product that is capable of being put in a semiliquid state, in particular cheese (Page 1, lines 2-7), the package being made up of two thin sheets (1, 8) (Page 1, lines 7-8), namely a first sheet (1) cut out to an appropriate outline and shaped into a rectangular shell for receiving the product (Page 1, lines 8-10), and so as to present a pull corner (2) for opening the package (Page 2, lines 18 - 20), and a second sheet (8) cut to at least the dimensions of the bottom of the shell (Page 1, lines 11-12; Page 4, lines 15-17) and for placing flat on the product with the side faces (A, B, C, D) of the shell being folded down thereon (Page 1, lines 13-14; Page 4, lines 19-23), and heat-sealed, while leaving the pull corner (2) free (Page 1, lines 13-15), and two tear strips (5, 6) disposed on and secured to the first sheet (1), so as to be entrained when the pull corner (2) is pulled (Page 1, lines 15-17),

where the pull corner (2) is formed by a triangular projection formed on one of the sides of the first sheet (1) cut out into an octagonal shape, and where the tear strips (5, 6) form a pointed U-shape with the tip thereof being situated in said triangular projection (Page 2, lines 12-15).

Independent claim 13: A leakproof rectangular parallelepiped package that includes:

a first sheet (1) of polypropylene in the shape of a rectangular shell having a bottom and four side walls (A, B, C, D) for receiving a product (Page 3, lines 32-37);

a pull corner (2) formed by a triangular projection positioned on one of said side walls of said first sheet (1), said pull corner (2) being adapted for opening the package (Page 2, lines 13-15);

a second sheet (8) of polypropylene having at least the dimensions of the bottom of the rectangular shell (Page 1, lines 11-12), said second sheet (8) adapted to form a flat cover over said product (Page 1, lines 12-13; Page 4, lines 19-23);

said four side walls (A, B, C, D) being configured so that portions of said walls situated above the second sheet (8) are folded down onto said second sheet (8) (Page 2, lines 33-36) and heat-sealed to form said leakproof rectangular parallelepiped package, while leaving the pull corner free (Page 1, lines 13-15; Page 4, lines 4-7); and

two tear strips (5, 6) disposed on and secured to said first sheet (1) and configured to form a pointed U-shape with a tip portion positioned in said triangular projection so that when the pull corner (2) is grasped by a user (Page 3, lines 23-27), the two tear strips (5, 6) are also grasped by said user so as to be entrained when the pull corner (2) is pulled to enable rapid

opening of said package without encountering resistance of a fold
(Page 2, lines 18-20),

where said package is adapted to contain a semisolid
product capable of being put in a semiliquid state (Page 1, lines
2-6).

6. Grounds of Rejection to be Reviewed on Appeal

The first and sole ground for review on appeal is whether claims 7-19 are unpatentable over FR '469 (FR 2,198,469) in view of FR '025 (FR 2,499,025) and Layne (U.S. Patent 3,547,768) sufficient to support a rejection under 35 USC §103(a).

7. Arguments

7.1 First And Only Ground - Rejection Over FR '469, FR '025 And Layne

7.1.1 Interpretation of 35 USC §103

When a rejection is based on 35 USC §103, what is in issue in such a rejection is "the invention as a whole," not just a few features of the claimed invention. Under 35 U.S.C. §103, "[a] patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a *whole* would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains." The determination under §103 is whether the claimed invention as a *whole* would have been obvious to a person of ordinary skill in the art at the time the invention was made. See *In re O'Farrell*, 853 F.2d 894, 902, 7 USPQ2d 1673, 1680 (Fed. Cir. 1988). In determining obviousness, the invention must be considered as a whole and the claims must be considered in their entirety. See *Medtronic, Inc. v. Cardiac Pacemakers, Inc.*, 721 F.2d 1563, 1567, 220 USPQ 97, 101 (Fed. Cir. 1983).

In rejecting claims under 35 USC §103, it is incumbent on the Examiner to establish a factual basis to support the legal conclusion of obviousness. See, *In re Fine*, 837 F.2d 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). In so doing, the Examiner is expected to make the factual determinations set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17, 148 USPQ 459, 467 (1966), and

to provide a reason why one of ordinary skill in the pertinent art would have been led to modify the prior art or to combine prior art references to arrive at the claimed invention. Such reasoning must stem from some teaching, suggestion or implication in the prior art as a whole or knowledge generally available to one having ordinary skill in the art. *Uniroyal Inc. v. F-Wiley Corp.*, 837 F.2d 1044, 1051, 5 USPQ2d 1434, 1438 (Fed. Cir. 1988), cert. denied, 488 U.S. 825 (1988); *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 293, 227 USPQ 657, 664 (Fed. Cir. 1985), cert. denied, 475 U.S. 1017 (1986); *ACS Hospital Systems, Inc. v. Montefiore Hospital*, 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984). These showings by the Examiner are an essential part of complying with the burden of presenting a *prima facie* case of obviousness. Note, *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification. *In re Fritch*, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1783-84 (Fed. Cir. 1992).

The criteria for patentability has been refined by the by the Supreme Court in *KSR International Co. v. Teleflex Inc. (KSR)*, 550 U.S. 398, 82 USPQ2d 1385 (2007). The Supreme Court in *KSR* reaffirmed the familiar framework for determining obviousness as set forth in *Graham v. John Deere Co.* (383 U.S. 1, 148 USPQ 459 (1966)), but stated that the Federal Circuit had erred by applying the teaching-suggestion-motivation (TSM) test in an overly rigid

and formalistic way. KSR, 82 USPQ2d at 1391. Specifically, the Supreme Court stated that the Federal Circuit had erred in four ways: (1) "by holding that courts and patent examiners should look only to the problem the patentee was trying to solve" (Id. 82 USPQ2d at 1397); (2) by assuming "that a person of ordinary skill attempting to solve a problem will be led only to those elements of prior art designed to solve the same problem" (Id.); (3) by concluding "that a patent claim cannot be proved obvious merely by showing that the combination of elements was 'obvious to try'" (Id.); and (4) by overemphasizing "the risk of courts and patent examiners falling prey to hindsight bias" and as a result applying "[r]igid preventative rules that deny factfinders recourse to common sense" (Id.).

Although the Supreme Court in KSR cautioned against an overly rigid application of teaching-suggestion-motivation (TSM) rationale, it also recognized that TSM was one of a number of valid rationales that could be used to determine obviousness. (According to the Supreme Court, establishment of the TSM approach to the question of obviousness "captured a helpful insight." 82 USPQ2d at 1396 (citing *In re Bergel*, 292 F.2d 955, 956-57, 130 USPQ 206, 207-208 (1961)).

Further, a finding of unpatentability over 35 USC §103 can be rebutted by a showing of unexpected results. Any differences between the claimed invention and the prior art may be expected to result in some differences in properties. The issue is whether the properties differ to such an extent that the difference is really

unexpected. *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986) (differences in sedative and anticholinergic effects between prior art and claimed antidepressants were not unexpected). *In re Waymouth*, 499 F.2d 1273, 1276, 182 USPQ 290, 293 (CCPA 1974), the court held that unexpected results for a claimed range as compared with the range disclosed in the prior art had been shown by a demonstration of "a marked improvement, over the results achieved under other ratios, as to be classified as a difference in kind, rather than one of degree." Compare *In re Wagner*, 371 F.2d 877, 884, 152 USPQ 552, 560 (CCPA 1967) (differences in properties cannot be disregarded on the ground they are differences in degree rather than in kind); *Ex parte Gelles*, 22 USPQ2d 1318, 1319 (Bd. Pat. App. & Inter. 1992) ("we generally consider a discussion of results in terms of 'differences in degree' as compared to 'differences in kind' . . . to have very little meaning in a relevant legal sense").

7.1.2 The Present Invention

The present invention pertains to a leakproof package for a semisolid material such as cheese. The present invention is illustrated by way of example, in Figures 1 and 2 of the application, which are reproduced below.

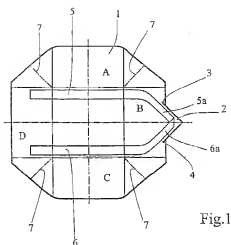


Fig.1

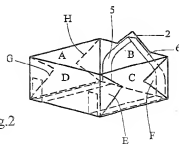


Fig.2

As is typically set forth in independent claim 7 (and claim 13), the leakproof package is in the form of a rectangular parallelepiped of polypropylene suitable for rapid opening by tearing and for containing a semisolid product that is capable of being put in a semiliquid state, in particular cheese. The package is made up of two thin sheets, namely a first sheet cut out to an appropriate outline and shaped into a rectangular shell for receiving the product, so as to present a pull corner for opening the package, and a second sheet cut to at least the dimensions of the bottom of the shell and for placing flat on the product with the side faces of the shell being folded down thereon, and heat-sealed, while leaving the pull corner free.

Two tear strips, **which are distinct elements**, are disposed on and secured to the first sheet, so as to be entrained when the pull corner is pulled.

In the present invention, the pull corner is formed by a triangular projection formed on one of the sides of the first sheet cut out into an octagonal shape, and wherein the tear strips form a pointed U-shape with the tip thereof being situated in the triangular projection.

Views of the leakproof package are also shown in Figures 3 and 4, which are reproduced below.

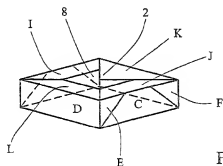


Fig.3

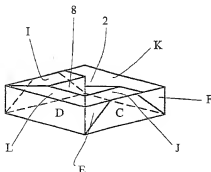


Fig.4

In the present invention, such as is set forth in claim 7, it is clear that the side faces of the first sheet shaped into the rectangular shell are folded down and heat-sealed on the

second sheet **while leaving the pull corner free**. Thus, the pull corner is present during the manufacture of the leakproof package and therefore **before its opening**.

7.1.3 Distinctions Of The Present Invention Over The Applied Art

In the final position in the Advisory Action of August 14, 2009, it is asserted that the claims **do not**:

- state the two tear strips and the first sheet are distinct, and

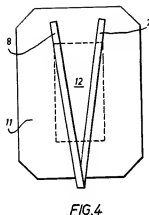
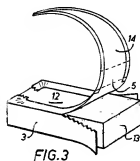
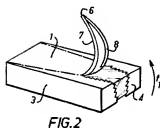
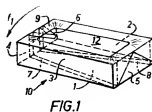
- specify when the package has the particular shapes.

This is not correct. Claim 7 of the present invention recites "A leakproof package comprising . . . a first sheet cut out to an appropriate outline . . . so as to present a pull corner . . . and two tear strips disposed on and secured to the first sheet." See also claim 13. Thus, the two tear strips and the pull corner which is a part of the first sheet are necessarily **distinct elements** of the leakproof package.

Claim 7 (and also claim 13) also makes clear that the side faces of the first sheet shaped into the rectangular shell are folded down and heat-sealed on the second sheet **while leaving the pull corner free**. Thus, the pull corner is present during the manufacture of the leakproof package and therefore **before its opening**.

Now consider FR '469.

FR '469 pertains to a package for cheese portions. The Official Action refers to Figures 1-4 of FR '469, which are reproduced below.

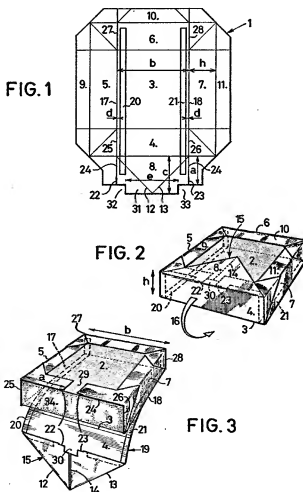


As can be seen, FR '469 sets forth a leakproof package that includes a first sheet 11, a second sheet 12 and two tear strips 7, 8 disposed on and secured to the first sheet 11 (see page 3, lines 6 to 11). The junction of the two tear strips 7, 8 projects with respect to the first sheet 11 (Figure 4).

The leakproof package of FR '469 does not include any pull corner formed by a triangular projection from one side of the **first sheet**. In contrast, the pull corner is only formed by the junction of the **two tear strips 7, 8**. The sheets 11, 12 are made of **aluminum** (see page 3, line 26).

FR '469 therefore does not disclose a package with *"a first sheet cut out to an appropriate outline . . . so as to present a pull corner . . . and two tear strips disposed on and secured to the first sheet"* where the pull corner is present before heat-sealing the first sheet to a second sheet, as is typically set forth in claim 7 (see also claim 13).

The final Office Action of March 17, 2009 refers to Figures 1-3 of FR '025, which are reproduced below.



FR '025 sets forth an **aluminum** leakproof package (see page 4, line 6) where the pull corner is in the form of a rectangular projection 8, and the two tear strips 20, 21 are substantially

parallel to each other (see page 5, lines 5 to 9 and 13 to 19; Figure 1). The two tear strips do not form a pointed U-shape and are **not situated in** the rectangular projection 8, nor in the triangular portion 15.

Neither FR '469 nor FR '025 disclose or suggest at least the following features of independent claims 7 and 13 of the present invention:

- the pull corner is formed by a **triangular projection from one side of the first sheet** (the pull corner disclosed in FR '469 is formed by the junction of the two tear strips which are separated from the first sheet);
- the tear strips are **situated in the projection and distinct from the pull corner**; and
- the first and second sheets are made of **polypropylene**.

In contrast, the leakproof package of the present invention includes **the pull corner** formed by a triangular projection of the first sheet **and the two tear strips** in the form of a pointed U-shape, **the pull corner and the tear strips being distinct from each other**, provides an easier opening as the tear strips are situated in the triangular projection, such that when tacking hold of the pull corner, the two rear strips are also taken hold of. Thus, the package can be opened without encountering the resistance of a fold (see page 2, lines 12-20 of the specification).

Layne pertains to a **heat shrinkable** (see column 1, lines 26-27, abstract and title) plastic film with a thin layer of moisture vapor-barrier wax. The plastic film is, for example, made of polypropylene (see column 2, lines 38 to 44).

The French patents **are not compatible with heat shrinkable films**, especially concerning the opening of the packages by holding of the tear strips.

Furthermore, a package made of **heat shrinkable film** would be particularly unsuitable "*for containing a semisolid product that is capable of being put in a semiliquid state,*" especially during the step of shrinking the film under hot temperature which is necessary for packaging a product with a heat shrinkable film. Thus, non heat shrinkable film, such as a polypropylene film, is much more appropriate "*for containing a semisolid product that is capable of being put in a semiliquid state,*" and a person of ordinary skill in the art would not have been turned to Layne's heat shrinkable film.

Additionally, the first and second sheets of the leakproof package of claims 7 and 13 of the present invention are not formed from layers, one layer being made of polypropylene, **but are only made of polypropylene** (see page 2, line 11; page 3, line 13, page 4, line 11; page 5, lines 8-9).

One of ordinary skill and creativity would thus fail to produce a claimed embodiment of the present invention from a knowledge of FR '469, FR '025 and Layne. A *prima facie* case of unpatentability has thus not been made.

This unpatentability rejection should accordingly be withdrawn.

8. Conclusion

The Appellants have demonstrated that the Examiner has failed to successfully allege that the rejected claims are *prima facie* unpatentable. It is clear that the present invention, as claimed, represents a technology for packaging a cheese product that is truly inventive.

For the reasons advanced above, it is respectfully submitted that all the rejected claims in this application are allowable. Thus, favorable reconsideration and reversal of the Examiner's rejections of claims 7-19 under 35 USC §103 by the Honorable Board of Patent Appeals and Interferences, are respectfully solicited.

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The Commissioner is hereby authorized in this, concurrent, and future submissions, to charge any deficiency or credit any overpayment to Deposit Account No. 25-0120 for any additional fees required under 37 C.F.R. § 1.16 or under 37 C.F.R. § 1.17.

Respectfully submitted,

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9. Claims Appendix

7. A leakproof package in the form of a rectangular parallelepiped of polypropylene suitable for rapid opening by tearing and for containing a semisolid product that is capable of being put in a semiliquid state, in particular cheese, the package being made up of two thin sheets, namely a first sheet cut out to an appropriate outline and shaped into a rectangular shell for receiving the product, and so as to present a pull corner for opening the package, and a second sheet cut to at least the dimensions of the bottom of the shell and for placing flat on the product with the side faces of the shell being folded down thereon, and heat-sealed, while leaving the pull corner free, and two tear strips disposed on and secured to the first sheet, so as to be entrained when the pull corner is pulled,

wherein the pull corner is formed by a triangular projection formed on one of the sides of the first sheet cut out into an octagonal shape, and wherein the tear strips form a pointed U-shape with the tip thereof being situated in said triangular projection.

8. A package according to claim 7, wherein the side of the first sheet provided with the pull corner presents two tear starters.

9. A package according to claim 8, wherein the tear starters are constituted by cuts situated to extend the sides of the pull corner.

10. A package according to claim 7, wherein the tear strips are situated inside the shell and extend along two sides of the bottom of said shell.

11. A package according to claim 7, wherein the side faces of the shell situated on either side of the tear strips are folded down onto the folded-down portions of the other two side faces.

12. A package according to claim 7, wherein the side faces extending transversely relative to the tear strips of the shell are folded down onto the folded-down portions of the other two faces.

13. A leakproof rectangular parallelepiped package comprising:

a first sheet of polypropylene in the shape of a rectangular shell having a bottom and four side walls for receiving a product;

a pull corner formed by a triangular projection positioned on one of said side walls of said first sheet, said pull corner being adapted for opening the package;

a second sheet of polypropylene having at least the dimensions of the bottom of the rectangular shell, said second sheet adapted to form a flat cover over said product;

said four side walls being configured so that portions of said walls situated above the second sheet are folded down onto said second sheet and heat-sealed to form said leakproof rectangular parallelepiped package, while leaving the pull corner free; and

two tear strips disposed on and secured to said first sheet and configured to form a pointed U-shape with a tip portion positioned in said triangular projection so that when the pull corner is grasped by a user, the two tear strips are also grasped by said user so as to be entrained when the pull corner is pulled to enable rapid opening of said package without encountering resistance of a fold,

wherein said package is adapted to contain a semisolid product capable of being put in a semiliquid state.

14. The leakproof rectangular parallelepiped package of claim 13, wherein said side wall provided with said pull corner comprises two tear starters.

15. The leakproof rectangular parallelepiped package of claim 14, wherein each tear starter comprises cuts situated to extend sides of the pull corner.

16. The leakproof rectangular parallelepiped package of claim 13, wherein the tear strips are positioned inside said rectangular shell and extend along two sides of the bottom of said rectangular shell.

17. The leakproof rectangular parallelepiped package of claim 13, wherein the portions of the side walls of the rectangular shell positioned on either side of the tear strips are folded down onto the folded-down portions of the other two side walls.

18. The leakproof rectangular parallelepiped package of claim 13, wherein the portions of the side walls extending transversely relative to the tear strips of the rectangular shell are folded down onto the folded-down portions of the other two side walls.

19. The leakproof rectangular parallelepiped package of claim 13, wherein said semisolid product is cheese.

10. Evidence Appendix

NONE.

11. Related Proceedings Appendix

NONE.